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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JOHN L. CONNOLLY, et al.,

Appellant,

v.

PENSION BENEFIT GUARANTY CORPORATION, et al.,

Appellee.

and

WOODWARD SAND CO., INC., et al.,

Appellant,

v.

PENSION BENEFIT GUARANTY CORPORATION, et al.,

Appellee.

BRIEF OF AMERICAN WAREHOUSEMEN'S ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

WILLIAM H. TOWLE*
JAMES E. HOWIE, JR.
HERRICK, PEREGRINE, TOWLE & HOWIE
400 Lathrop Avenue
River Forest, IL 60305
(312) 771-6330

* Counsel of Record

Pandick Midwest, Inc., Chicago • 454-7600

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TABLE OF CONTENTS

	PAGE
Table of Authorities	ii
Introduction and Statement of Interest	1
Summary of Argument	3
The MPPAA takes the property of warehouse employers without constitutional justification	3
Argument	4
Conclusion	7

TABLE OF AUTHORITIES

CASES:

	PAGE
Allied Steel v. *Spannaus*, 438 U.S. 234 (1978)	6
Dorn's Transportation, Inc. v. *I.A.M. National Pension Fund*, 578 F. Supp. 1222 (D.D.C.-1984)	4
Nachman v. *Pension Benefit Guaranty Corporation*, 592 F.2d 947 (7th Cir. 1979), *aff'd.* 446 U.S. 359 (1980)	5
Peick v. *Pension Benefit Guaranty Corporation*, 539 F. Supp. 1025 (N.D. Ill. 1982), *aff'd.* 724 F.2d 1247 (7th Cir. 1983)	5, 7
United States v. *General Motors Corp.*, 323 U.S. 373 (1945)	4
United States Trust Co. v. *New Jersey*, 431 U.S. 1 (1977)	6
Usery v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976)	6

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INTRODUCTION AND STATEMENT OF INTEREST

The AMERICAN WAREHOUSEMEN'S ASSOCIATION (AWA) is the national trade association of the public merchandize warehousing industry. It has 430 members located throughout the United States.

The public warehouse industry has historically consisted of small businesses, owned by individuals or families who reside where the warehouse is located.

Because public warehouses are constantly involved in the motor transportation of goods, both inbound and outbound, it has usually been the teamsters union which has organized warehouse employees. Along with such teamster representation has come the requirement to belong to teamster multi-employer pension plans.

Virtually all of the public warehousemen who are bound by multi-employer pension plans joined such plans prior to 1980. Thus, at the time they agreed to such plans there was no withdrawal liability.

As to the underfunding of the plans, public warehousemen were neither, because of their small size and collateral relationship to the trucking industry, negotiators who established the terms of the plan nor trustees who decided issues of investments and benefits. Also, unlike the trucking industry, warehousemen have not experienced a high rate of business failure or bankruptcy with resultant losses to the pension fund.

Despite the fact that warehousemen were not the precipitating cause of the underfunding problem, they are entrapped in the legislative solution.

Family owned businesses which are the retirement nest egg of elderly owners cannot be sold, or if sold, must be discounted in value because of the withdrawal liability imposed by the statute. Withdrawal liability can occur without an employer's involvement. The employees can change unions and withdrawal liability can be triggered. In that event the employer may also be making contributions to the pension plan of the new union. Partial withdrawal liability can attach where a major account changes its distribution patterns or for a variety of other reasons a warehouse reduces its operations.

None of these effects were contemplated by warehousemen who agreed to multi-employer plans. The appropriation of their capital was not within their bargain.

The AWA submits this brief in the belief that the legislation is an unconstitutional taking of the property of warehousemen who are members of multi-employer pension plans.

SUMMARY OF ARGUMENT

The MPPAA takes the property of warehouse employers without constitutional justification.

ARGUMENT

The withdrawal liability provisions of MPPAA constitute an unconstitutional taking under the taking clause of the 5th Amendment. In order to make a claim under the taking clause, the claimant must prove that property has been taken. Property is defined as "that bundle of rights inhering in the citizen's relation to a physical thing, as the right to possess, use and dispose of it." *United States* v. *General Motors Corp.*, 323 U.S. 373, 378 (1945).

Every reported decision concerning the taking clause in a MPPAA case rejects the claimant's argument that the withdrawal liability provisions constitute a taking. The lower court in the case herein found that no property had been taken. Apparently the property was considered to be the employers right to withdraw from a multi employer plan without incurring withdrawal liability.

Regardless of how the property taken is characterized, whether it is the right not to make additional contributions to the multi-employer plan, or whether it is the loss generated by payment of the withdrawal liability as a result of MPPAA withdrawal liability provisions, a withdrawing employer loses an amount equal to its share of the unfunded vested liability in the plan. The employer may not be losing a specific piece of property, but the employer is losing a certain, ascertainable portion of its assets. This is clearly taking of property without just compensation.

To ignore the taking requires the type of analysis undertaken in *Dorn's Transportation, Inc.* v. *I.A.M. National Pension Fund*, 578 F.Supp. 1222, 1235 (D.D.C.-1984). There the Court recognized that contract rights are considered property within the meaning of the taking clause, but found that considerations of public policy justify the taking under MPPAA.

This type of analysis starts with the case of *Nachman* v. *Pension Benefit Guaranty Corporation,* 592 F. 2d 947 (7th Cir. 1979) affirmed on statutory grounds, 446 U.S. 359 (1980).

This case considered the constitutionality of ERISA, the Pension Reform Act of 1974 and a single employer plan to which the employer made contributions until it closed its plant. The 7th Circuit Court of Appeals reversed the district court's summary judgment in favor of the employer request that ERISA imposed no withdrawal liability for unfunded vested liability. The Court held the employer liable and sustained the constitutionality of ERISA. The *Nachman* Court adopted a four point test of constitutionality (592 F.2d 947, 960):

1. Reliance interests of the parties affected;

2. Whether impairment of private interests occurred in an area previously subject to regulatory control;

3. The equities of the burdens imposed; and,

4. The provisions to limit and moderate the impact of the burdens.

The *Nachman* analysis was applied to MPPAA, in *Peick* v. *Pension Benefit Guaranty Corporation,* 539 F.Supp. 1025, (N.D. Ill.-1982), aff'd. 724 F.2d 1247. (7th Cir. 1983). The District Court focused primarily on the reliance and notice issues and found MPPAA constitutional on all points.

This analysis is, however, defective in two key respects. In the first place, it ignores the key difference between a single employer plan where all contributions cease when an employer withdraws and a multi-employer plan where continuity is not necessarily threatened by one employer's withdrawal.

The effect of holding an employer liable for withdrawal liability is to completely unsettle cost expectations that an employer takes away from the bargaining table. When pension

plan contributions are negotiated the employer can make a calculation of costs per hour. In the typical multi-employer plan, the employer agreed to make contributions, but disclaimed liability for plan administration, performance or benefits. The employer had no control over asset performance in the market place, but now with MPPAA, he is liable for unfunded vested liability.

In the second place, the *Nachman* analysis ignores the traditional tests of public purpose, necessity and responsibility.

These tests have been the subject matter of at least two Supreme Court decisions. One of these is *Usery* v. *Turner Elkhorn Mining Co.,* 428 U.S. 1 (1976), where the Court upheld a congressional act granting new benefits to retired miners suffering from black lung disease. The other case is *Allied Steel* v. *Spannaus,* 438 U.S. 234 (1978), where the Court rejected a Minnesota statute which provided for vesting of a pension after 10 years of employment while the employer's plan provided for 15 year vesting. The Court cited the following language from an earlier opinion in *United States Trust Co.* v. *New Jersey,* 431 U.S. 1, (1977): "legislation adjusting the rights and responsibilities of contracting parties must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption". (431 U.S. 1, 22).

The difference in result in these cases appears to be necessity. The black lung problem justified the imposition of a new, unbargained for burden. The conditions which caused black lung was generally within the knowledge and control of the persons upon whom liability was imposed. The performance of the pension funds was not generally within the control of those upon whom liability was imposed.

The other point in *Peick* deserves consideration. The trial judge gave a great deal of emphasis to the view that a field once the subject of regulation is always subject to more extensive regulation. This prior regulation with ERISA and Taft-Hartley

was notice to employers that Congress intended to be involved in the private pension system (*Peick*, 539 F.Supp., at P. 1044-45).

Holding as the court did in *Peick* that once regulation has begun, more will follow and the employer must have known that it would be forthcoming by imposing a huge liability on a withdrawing employer does not adequately assess the relative burdens of the involved regulation. Clearly a modest, reasonable regulation does not automatically justify the unforeseen, Draconian solution of withdrawal liability.

MPPAA takes the property of warehouse employers and such taking is outside of accepted constitutional standards.

CONCLUSION

For the foregoing reasons we submit that the decision of the United States District Court for the Central District of California, Three Judge Court, is erroneous, and that this Court should find that the withdrawal liability provisions of the Multi Employer Pension Amendment Act of 1980 are unconstitutional.

Respectfully submitted,

WILLIAM H. TOWLE*
JAMES E. HOWIE, JR.
HERRICK, PEREGRINE, TOWLE
& HOWIE
400 Lathrop Avenue
River Forest, IL 60305
(312) 771-6330

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